

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



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PNS

75-1053

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 1264—September Term, 1974.

(Argued August 13, 1975      Decided November 20, 1975.)

Docket No. 75-1053

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United States of America,

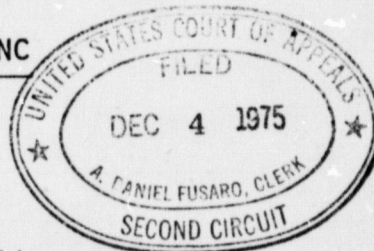
Appellee,

v.

Ernest Harvey, Jr.,

Appellant,

PETITION FOR REHEARING AND  
PETITION FOR REHEARING EN BANC  
AND TO STAY MANDATE



George W. F. Cook, United States Attorney,  
District of Vermont (William B. Gray,  
Assistant U. S. Attorney, District of  
Vermont, of counsel), for Appellee.

Bennett E. Greene, Esq., for Appellant.

COUNT VI  
Petition For Rehearing And  
Petition For Rehearing En Banc  
And To Stay Mandate

As to those portions of the Court's opinion regarding interstate transportation of dynamite, the Court erred. As to the issue of interstate transportation, the Court stated, at Page 6508 of the slip opinion, "In fact, the ultimate source (of the dynamite) is irrelevant here where there is nothing in the entire record of the proceedings below to suggest that the dynamite came from anywhere but Vermont on the night of the attempted burglary."

Defendant-appellant argues:

- 1) The ultimate source of the dynamite is not only relevant but an essential element of the charged offenses in question. If the dynamite were found to have been manufactured and transported solely within New Hampshire, then defendant would not be guilty of interstate transportation.
- 2) The Court's opinion as above reproduced assumes defendant-appellant is guilty. Actually, he is to be presumed not guilty.
- 3) The Court's opinion as above reproduced implies that defendant had the burden (at trial below) of proving that he was innocent. Actually, the burden of proof was upon the government. The government failed to sustain the burden

of proving this essential element of the charged courts in question. To wit, the government failed to introduce evidence from which the jury would have been warranted in finding that defendant transported dynamite (as also alleged in The Bill of Particulars) from Vermont to New Hampshire.

4) The Court appears to imply that the " . . . additional testimony from a Vermont police official that there had been numerous dynamite thefts from granite sheds in the Barre area . . ." (over defendant's objection) tends to establish that defendant stole dynamite in the Barre, Vermont area and then transported it to New Hampshire at Page 6508 of slip opinion. But in fact, no evidence was introduced which connected the defendant to the alleged thefts.

5) Contrary to the Court's implication on Page 6508 of the slip opinion, Kiblin never said that Harvey said from where the dynamite would be brought.

As to these portions of the Court's opinion regarding conspiracy to violate the civil rights of Byron Nutbrown, III in violation of 18 U.S.C. Section 241, the Court erred.

1) At Page 6505 of slip opinion the Court states, "We therefore conclude that the extra-judicial statements of Byron Nutbrown were properly admissible to prove the scope of his (Byron Nutbrown's) knowledge, an important factor in showing Harvey's motive." It is both semantically and psychologically impossible for Byron Nutbrown's "scope of knowledge" to have any effect upon defendant Harvey's motive

unless Harvey were a mind reader. Rather, Harvey's motive would be the product of his own thoughts and perceptions. Evidence tending to show Harvey's thoughts and perceptions (of Byron Nutbrown's particular statements) is relevant here. However, mere showing of Nutbrown's particular statements, without a showing that Harvey knew of those particular statements, is not relevant.

2) At Page 6505 of slip opinion, the Court states Harvey's knowledge (counsel's knowledge) of the existence of Government's Exhibit 5 " . . . and of the government's intention to introduce that statement in connection with Count VI . . . ." In fact, on the morning of trial, counsel was handed a stack of papers and told to sign a receipt therefor.

Verbal statements from government counsel indicated that the respective items in the stack may or may not be introduced.

The record shows defendant-appellant's timely motion to produce statements of Byron Nutbrown. Had the motion been timely granted, defendant and counsel would have been better able to consider Government's Exhibit 5.

For the above stated reasons, defendant-appellant petitions for rehearing en banc and, in addition, for rehearing before the judges who took arguments in this appeal; and that mandate be stayed.

Respectfully submitted this second day of December,  
1975 for defendant-appellant by and through his attorney.

Bennett E. Greene, Esq.  
c/o Rosenberg and Rosenberg  
100 Church Street  
Burlington, Vermont

CERTIFICATE OF SERVICE

I, Bennett Evans Greene, appointed attorney for Ernest Harvey, Jr., hereby certify that I have served the above Petition for Rehearing upon United States Attorney George W. F. Cook by mailing to him copies hereof pursuant and according to Rule 31(b) of the Federal Rules of Appellate Procedure.

Dated at Burlington, Vermont this Third day of  
December, 1975.

A handwritten signature in dark ink, appearing to read 'Bennett E. Greene', written over a horizontal line.

Bennett E. Greene